

STATE OF MICHIGAN
COURT OF APPEALS

BEZTAK COMPANY, JERRY D. LUPTAK and
HAROLD D. BEZNOS,

Plaintiffs-Appellants,

v

JAMES J. VLASIC, JUSTIN C. RAVITZ and
SOMMERS, SCHWARTZ, SILVER &
SCHWARTZ, P.C.,

Defendants-Appellees.

UNPUBLISHED

August 19, 2003

No. 236518

236519

236520

Oakland Circuit Court

LC No. 98-011017-NM

Before: Sawyer, P.J. and Meter and Schuette, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs appeal as of right the grant of defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

The families of Harold Beznos and Jerry Luptak own Beztak Company and numerous entities that develop residential and commercial real estate nationwide. Beztak Company employed Walter Kutchins, a longtime acquaintance of Jerry Luptak, in 1970. Kutchins sued some of plaintiffs' entities and members of the Beznos and Luptak families. Kutchins claimed that Jerry Luptak and Harold Beznos breached an agreement to give Kutchins a 10 percent partnership in several entities and pay Kutchins fair market value for services rendered to some of plaintiffs' entities. The agreement was an oral agreement in 1973 and became partially documented in 1976 and 1978 partnership agreements.

Under the agreement, Kutchins claimed that he was to become a 10 percent owner of Beztak projects in which he had ever been involved. Plaintiffs agreed with Kutchins on the agreements that Kutchins signed. However, plaintiffs disputed Kutchins' further claim that he was an undisclosed partner in those partnerships where he was not a party to the written agreement. Kutchins claims that this was so Luptak could take his tax depreciation deduction.

Kutchins sought compensation for the loss of these partnerships or an accounting to determine the extent of his partnership holdings. He also sought lost salaries and filed a claim for breach of fiduciary duties claiming that plaintiffs' diverted monies and opportunities to enterprises owned by plaintiffs and Kutchins. Plaintiffs retained defendants to represent them in the suit. Both parties agree that the issue of the oral agreement weakened Kutchins' case while plaintiffs' position was weakened by the fact that they had long-term mistresses who received corporate monies.

Litigation began in 1992 and the case went to jury trial in 1996. The trial court and all parties initially believed a non-jury accounting trial was required to determine the value of the interests plaintiffs conceded belonged to Kutchins. Initially the trial court ordered bifurcation of the jury trial on liability for disputed interests and damages, but later vacated that order.

In May 1996, the jury by a special verdict awarded Kutchins \$16,358,158 plus interest. The verdict consisted of several awards against plaintiffs for breach of the salary shortfall agreement, breach of the sweat equity agreement and breach of fiduciary duty. Following that verdict, plaintiffs filed at least ten lawsuits against Kutchins and his son in Michigan and in Florida. In March 1998, plaintiffs and Kutchins privately settled all outstanding claims concerning both conceded and unconceded entities. Plaintiffs estimate that they have paid Kutchins \$9 million dollars to completely settle the matter.

Subsequently, plaintiffs sued defendants to recover the settlement payments and other damages. Defendants counterclaimed for unpaid fees. Plaintiffs' claims alleged 21 counts of malpractice with others to be discovered. The issue on appeal is the trial court's grant of defendants' motion for summary disposition dismissing these 21 counts. Plaintiffs alleged that defendants committed negligence and malpractice.

In regard to plaintiffs' claims, defendants respond that they were not negligent, but in fact executing strategy and practices. Defendants point out that they obtained a significant victory early on in the case. Defendants were able to convince the trial court to bifurcate the liability and damages portions of the underlying case. The benefit was that Kutchins was not allowed to take any discovery pertaining to the unconceded entities. The major share of Kutchins' claim dealt with the unconceded entities. Even though the liability and damages portions of the underlying case were eventually united, discovery had closed and Kutchins did not obtain any discovery regarding the unconceded entities until the actual trial began.

Regarding the issues of experts, defendants claim that they identified two outside experts and three in-house accounting persons. Defendants claim that plaintiffs refused one of the damages experts and wanted to enlist an outside accounting firm. A representative of the suggested outside accounting firm shared the results with defendants. They were not the results plaintiffs desired. As a result, defendants decided to use the in-house accounting persons. Defendants felt that jurors would view the inside experts as more credible than outside hired guns.

Defendants received copies of all documents copied by Kutchins' expert Scheuer. At trial, they used in-house experts to attack Scheuer's methodology and results. In regard to Kutchins' expert on the salary claim, Sanford Gadiant, defendants initially brought a motion to

disallow his testimony. When he was eventually allowed to testify after disclosing information that he had withheld during his deposition, defendants impeached Gadiant by showing that he was a convicted felon. Defendants further attacked Gadiant by other tactics including the calling of fact witnesses to dispute the factual premise of Gadiant's figures.

Defendants also assert that they filed three motions for summary judgment/disposition in advance of trial. During trial, they also furnished a memorandum in support of a motion for directed verdict. As a result of the motions, several defendants in the underlying case were dropped and of the original twelve counts asserted against plaintiffs, only four remained.

Defendants also filed several motions to try to prevent the taking of depositions and discovery from plaintiffs' mistresses. Defendants recognized that testimony and evidence regarding the mistresses and diverted money could be extremely damaging to plaintiffs' images before the jury. The motions were not granted and defendants unsuccessfully tried again to keep the mistresses from testifying by filing a motion in limine just before the commencement of trial.

In response to plaintiffs' claim regarding the verdict form, defendants assert that they objected, although unsuccessfully, to the amendment allowing Beztak Company to be substituted in place of Beztak Associates, Ltd. Nonetheless, defendants claim that an adverse verdict was foreseeable. Defendants conducted two mock jury trials where Beznos and Luptak testified. The first mock jury trial utilized two separate mock juries. One jury awarded Kutchins \$8,000,000 and the second jury rendered no cause. Interviews were conducted on the second mock jury trial before a consensus verdict was reached. The mock jurors were told nothing about the mistress issue, but still found Beznos and Luptak unbelievable. Nonetheless, defendants assert that plaintiffs ignored the mock trial results and proceeded to trial.

DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

In June 2000, the court denied defendants' motion for summary disposition under MCR 2.116(C)(8) for failure to state a claim. The trial was scheduled for September 2001.

In April 2001, defendants filed three motions for partial summary disposition. The first motion sought to limit plaintiffs' claim for damages to what plaintiffs settled on in the underlying case (this motion is not the subject of this appeal). The second motion sought to dismiss certain legal malpractice claims and the breach of contract claim (this motion is not the subject of this appeal). The third motion, and the subject of this appeal, asserted that the alleged acts of legal malpractice were in fact good faith tactical decisions and that these claims are not actionable under existing case law. Plaintiffs filed briefs opposing each of defendants' motions.

FIRST MOTION

The court noted that by granting defendants' other two motions for partial summary disposition that this motion relative to damages was moot.

SECOND MOTION

The trial court granted defendants' motion for partial summary disposition of plaintiffs' breach of contract claim. The court applied the same legal principles relative to the legal malpractice portion of the opinion. The trial court found that an attorney is not an insurer of the result of a case in which he is employed unless he makes a special contract to that effect. The trial court found after reviewing the entire record that there were no facts establishing a special contract giving rise to a cause of action independent from the alleged legal malpractice claim. The grant of this motion is not being appealed.

THIRD MOTION

The trial court granted defendants' motion for summary disposition as to the legal malpractice claim. The court noted Michigan Rules of Professional Conduct 1.1(b) and *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995), where even if defendants violated a rule of professional conduct, such violation does not necessarily give rise to a cause of action for damages. Furthermore, the trial court noted that decisions made involving litigation strategies or trial tactics may avoid the issue of legal liability. The trial court also discussed *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) and applied the rule that a plaintiff cannot prevail in a legal malpractice suit by alleging that he may have prevailed in the underlying suit. The plaintiff must prove that absent the defendant's negligence, the plaintiff would have succeeded in the underlying case. *Id.*

The trial court found that an attorney/client relationship did exist between the parties. However, it did not find negligence in the representation of the client and subsequently that that negligence was the proximate cause of the injury and actual damages. The court found that the 21 factual questions in plaintiffs' response brief were merely second guessing of defendants' judgment in the underlying case. After careful review of the record, the trial court found that plaintiffs' legal malpractice claims were based on tactical decisions made by counsel at trial. As such, plaintiffs failed to come forward with sufficient proof to establish legal malpractice. Furthermore, the court found that even if defendants were negligent, plaintiffs failed to prove the element of proximate cause, i.e. that defendants' negligence actually caused the end result in the underlying case.

II. STANDARD OF REVIEW

Summary disposition of all or part of a claim or defense may be granted when

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mutual Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek, supra* at 337. This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*,

458 Mich 288, 294; 582 NW2d 776, reh den 459 Mich 1204; 615 NW2d 731 (1998). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; ___ NW2d ___ (2003).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000).

The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817, reh den 461 Mich 1205; 602 NW2d 576 (1999), and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra*, and the disputed factual issue must be material to the dispositive legal claims. *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The existence of a disputed fact must be established by admissible evidence, MCR 2.116(G)(6), *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); a mere promise to offer factual support at trial is insufficient, *Maiden, supra*. Speculation and conjecture are insufficient, but an opposing party need not rebut every possible theory which the evidence could support. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), rem'd 465 Mich 919; 638 NW2d 748 (2001). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2), *Auto-Owners Ins v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998), lv den 459 Mich 954; 616 NW2d 170 (1999). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475, reh den 445 Mich 1233; 521 NW2d 15 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592, lv den 431 Mich 877 (1988).

III. PROCEDURAL ISSUES

Before this Court can address the issue regarding the lack of support for defendants' motions for partial summary disposition, it must first resolve the issue of the number of claims

pleaded. Plaintiffs contend the number is 33 based on their proposed second amended complaint and defendants contend the number is 21 based on plaintiffs' first amended complaint.

Plaintiffs pleaded 21 claims in their first amended complaint. Based upon that complaint, defendants filed their motions for summary disposition. The trial court granted the motions for summary disposition on the basis of the first amended complaint. Plaintiffs then filed a motion for reconsideration wherein they included 33 claims (including the original 21). Both parties agree that plaintiffs never filed a motion to amend their first amended complaint.

Plaintiffs argue that their proposed second amended complaint contained all of the arguments asserted in their first amended complaint either specifically or within the "catch-all" language in paragraph 50(V) which stated, "other allegations which have not yet been determined but which will be established during the course of discovery."

Defendants reject that argument and urge this Court to apply the requirement of a higher degree of specificity in the pleadings of this case due to the complicated malpractice issues involved. Defendants rely on the following reasoning set forth in *Martinez v Redford Community Hosp*, 148 Mich App 221, 228-230; 384 NW2d 134 (1986):

In a negligence cause of action plaintiff must plead facts sufficient to reasonably inform defendant of the existence of a duty, a breach of that duty, the injury suffered and the causal relationship between the breach and the injury. *Roulo v Automobile Club of Michigan*, 386 Mich 324, 328, 192 NW2d 237 (1971). The Supreme Court's opinion in *Simonelli [v Cassidy]* 336 Mich 635; 59 NW2d 28 (1953)] says no more and no less than this with specific reference to medical malpractice actions.

The "with reasonable definiteness and certainty" language cited in the CJS passage quoted in *Simonelli, supra* at 644 does not set forth a heavier burden of pleading in medical malpractice cases than the "necessary reasonably to inform" language in GCR 1963, 111.1¹, applicable to all actions. The specificity required in any case, including a medical malpractice action, depends upon the circumstances of the case. This was underscored by the Supreme Court's citation in *Simonelli to Creen [v Michigan Cent R Co]*, 168 Mich 104, 133 NW 956 (1911), a case which involved the negligence of a railroad company, not

¹ GCR 1963, 111.1 is equivalent to MCR 2.111(B)(1) which states:

A complaint, counterclaim, cross-claim, or third-party complaint must contain the following:

(1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.

medical malpractice. The Court cited *Green* for the proposition that a declaration must advise a defendant with reasonable certainty, *according to the circumstances of the case*, of the facts upon which plaintiff relies. *Simonelli, supra*, at 644.

Neither *Simonelli* nor GCR 1963, 111.1(1) require pleadings in a medical malpractice cause of action to be more specifically pled than in other negligence or malpractice actions. Rather, the degree of specificity required flows from the circumstances of the case and from the nature of the action itself. Many medical malpractice actions involve a complex and technical factual basis which is outside the knowledge of the ordinary layperson. In considering the averments provided in a complaint "the court must be able to draw but one inference from the facts, as stated, and not from the pleader's inferences." *Schindler v Milwaukee, L S & W R Co*, 77 Mich 136, 153-154, 43 NW 911 (1889). Thus where the facts which form the basis of the action are outside the common knowledge of the ordinary layperson, a greater degree of specificity in the complaint will be required so as to lead the court to only one inference. This generalization is not a hard and fast rule peculiar to medical malpractice actions but, rather, the simple application of GCR 1963, 111.1(1) to any factually complicated lawsuit.

The instant case is one involving complicated issues of legal malpractice stemming from a large and complicated underlying suit. As a result, this case is one in which a greater degree of specificity in the pleadings is warranted.

Plaintiffs argue that their motion for reconsideration which contained 33 claims should be considered an amendment to their complaint, but do not explain why they never filed a motion to amend the complaint. We agree that had such a motion been filed, it probably would have been granted pursuant to MCR 2.116(I)(5) which states: "If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings." Nonetheless, plaintiffs never filed such a motion and the court never had the opportunity to make a ruling on the motions for partial summary disposition pursuant to the issues raised in the proposed second amended complaint. Therefore, based on the fact that the trial court never considered the additional claims and based on case law requiring a greater degree of specificity in the pleadings of complex cases, this Court will consider only the 21 claims raised in the first amended complaint and will not address the additional issues raised in the motion for reconsideration or in plaintiffs' briefs on appeal.

MCR 2.116(G)(3) and (4)

Plaintiffs next argue that defendants' motion for partial summary disposition under MCR 2.116(C)(10) failed to either present supporting evidence (as required by MCR 2.116(G)(3)), or to identify issues as to which defendants contend there is no genuine issue of material fact (as required by MCR 2.116(G)(4)). We disagree.

Specifically, plaintiffs contend that although their first amended complaint contained 21 different claims, defendants' motion for partial summary disposition mentioned only eleven of the claims and presented evidence on only three of the claims.

MCR 2.116(G)(3) states that in a motion for summary disposition:

Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required.

MCR 2.116 (G)(4) states that:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided by this rule, an adverse party may not rest upon mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

A review of defendants' brief in support of the motion for summary disposition indicates that defendants asserted that all of plaintiffs' claims involve matters of judgment and strategy. Defendants provided specific evidence and examples of this assertion with regard to the allegations of negligence: 1) connected with the underlying counterclaim; 2) damage experts, and; 3) the reading of Bryan Kutchins, deposition at trial. The brief goes on to state:

The argument set forth above apply [sic] as well to Plaintiffs' claims for failure to conduct discovery (§ 50H, I), failure to preserve objections made at trial (§ 50M), failure to give a jury a clear explanation of Beztak Company's structure (§ 50S), and the failure to make a "meaningful" damage argument during closing argument (§ 50T).

Plaintiffs rely on this Court's decision in *Meyer v City of Center Line*, 242 Mich App 560, 575, 619 NW2d 182 (2000). In *Meyer*, the plaintiff filed a hostile work environment claim and the defendants filed a motion for summary disposition. However, the defendants' supporting brief failed to specifically identify the issues with regard to which they believed there was no genuine issue of material fact, contrary to MCR 2.116(G)(4). In addition, the defendants did not present documentary evidence to show that there existed no genuine issue of material fact with respect to the hostile environment claim, contrary to MCR 2.116(G)(3)(b). The *Meyer* Court found that because the defendants did not properly present or support their motion for summary disposition under MCR 2.116(C)(10) with respect to the hostile environment claim, the plaintiff had no duty to respond to the motion. MCR 2.116(G)(4); *SSC Associates Ltd. Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 364, 480 NW2d 275 (1991). Therefore, the *Meyer* Court determined that the trial court erred in granting the defendants' motion for summary disposition of the hostile environment claim pursuant to MCR 2.116(C)(10).

However, even if defendants' briefs in support of their motions for partial summary disposition did not present specific evidence and examples in support of all 21 claims, the trial court had affidavits and depositions in the record that were sufficient basis for its conclusion that summary disposition was appropriate. MCR 2.116(I)(1) states:

If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

Therefore, the trial court did not err in considering all 21 of plaintiffs' claims even though defendants' brief in support of its motion for partial summary disposition did not address all of the claims.

IV. ATTORNEY JUDGMENT RULE

Defendants argue that based on the attorney judgment rule, the trial court correctly determined that they cannot be held liable for mere errors in judgment and that as a result of this rule, the trial court properly dismissed plaintiffs' claims. We agree.

In *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995), our Supreme Court discussed the attorney judgment rule. In *Simko*, the plaintiff was arrested for possession with intent to deliver a controlled substance and possession of a firearm during the commission or attempt to commit a felony. The plaintiff retained the defendant attorney to represent him. The defendant attorney made an unsuccessful motion for a directed verdict of acquittal and the plaintiff was convicted. The plaintiff then retained new appellate counsel and appealed. This Court reversed his conviction. The plaintiff then sued the defendant attorney for legal malpractice. He alleged that the defendant attorney breached his duty to the plaintiff by: 1) failing to adequately and properly investigate the plaintiff's case; 2) failing to discover the identity and whereabouts of witnesses necessary to the plaintiff's defense; 3) failing to assist the plaintiff at trial in defending the charges against him; 4) failing to produce witnesses; 5) failing to call the plaintiff's doctor or wife to explain the plaintiff's mental and physical condition; and; 6) failing to furnish reasonably prudent and proper legal service as required by law. *Id.* at 652-653.

The *Simko* Court stated that an attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client. *Id.* at 655-656. Further, an attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would act under the same or similar circumstances. *Id.* at 656. However, an attorney is not a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.* Further, "[w]here an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment." *Id.* at 658. Although "gross" errors in judgment can be actionable, mere errors in judgment by attorneys acting in good faith are not. *Id.*

More recently, in February 2002, this Court affirmed a grant of summary disposition for defendant attorneys in a legal malpractice case based on the attorney judgment rule in *Estate of Mitchell v Dougherty*, 249 Mich App 668; 644 NW2d 391 (2002). In *Mitchell*, the plaintiffs (former clients of defendant attorneys) brought a legal malpractice action against the attorneys whom they retained to represent them in a medical malpractice action, as well as the attorneys' former and current law firms. The claim was based on allegations that the attorneys failed to file a complaint within the statute of limitations period and that the attorneys negligently induced the plaintiffs to settle their claim against Oakwood Hospital for less than they were entitled. The lower court entered orders granting summary disposition to the defendant attorneys and law firms. The plaintiff clients appealed. This Court held that the attorneys' determination that its clients' medical malpractice case was without merit and their decision not to file suit within applicable limitations period was not actionable as legal malpractice. The *Mitchell* Court stated:

Here, plaintiffs allege that defendant attorneys were negligent in failing to file a medical malpractice action against Oakwood. It is important to note that this alleged failure was not mere oversight or the result of poor case management, but rather was an affirmative decision on the part of defendant attorneys not to pursue the action. According to defendant attorneys, they investigated plaintiffs' claims against Oakwood and determined, in their professional opinion, that the case was not worth pursuing.

Plaintiffs do not dispute whether defendant attorneys conducted an investigation into the merits of their case. Instead, plaintiffs argue that defendant attorneys' determination that the case against Oakwood was not worth pursuing is clearly negligent because plaintiffs' counsel in this legal malpractice action was able to locate more than one expert who would testify that the treatment Cara Mitchell received at Oakwood constituted medical malpractice. Further, plaintiffs stress that there were issues of fact regarding whether Cara was given an excessive dosage of the incorrect medication. However, the critical question here is not whether plaintiffs would have ultimately prevailed on their medical malpractice claim. Rather, the issue is whether defendant attorneys exercised reasonable skill, care, discretion, and judgment when they determined that plaintiffs' claim was not worth pursuing. *Simko, supra* at 655-656, 532 NW2d 842.

Here, the attorneys' opinion on the merit of plaintiffs' case was influenced in part by the attorneys' inability to locate an expert physician who would support plaintiffs' claim that Oakwood's treatment of Cara Mitchell was negligent. In addition, defendant attorneys point to the inherent conflicts in the evidence regarding whether Cara received either an incorrect medication or an incorrect dosage. Plaintiffs admitted that defendant attorneys informed them of their decision to file a complaint against Family First Clinic only and their reasons for not naming Oakwood in the suit.

Although it is true that plaintiffs' present counsel was able to obtain the affidavits of experts supporting plaintiffs' medical malpractice claim, this evidence does not negate the fact that defendant attorneys sought the opinion of an expert and received an opinion that was not favorable. The necessity of obtaining the testimony of an expert physician to support allegations of medical malpractice is codified in MCL § 600.2912d and MCL § 600.2169, and factual disputes without an expert opinion are insufficient to initiate, let alone maintain a medical malpractice action. Given the high standard for pursuing medical malpractice claims in this jurisdiction, we cannot fault defendant attorneys' reluctance to bring a malpractice action where they were unable to obtain the supportive testimony of a physician.

Plaintiffs present no evidence that the measures that defendant attorneys took in investigating plaintiffs' claims were less than an attorney of ordinary learning, judgment, or skill would have done under the same or similar circumstances. *Simko, supra*. In essence, plaintiffs allege that defendant attorneys erred in their judgment that plaintiffs' medical malpractice claim against Oakwood was without merit. Although "gross" errors in judgment can be actionable, *Basic Food, supra*

at 694, 310 NW2d 26, mere errors in judgment by attorneys acting in good faith are not. *Simko, supra* at 658, 532 NW2d 842. Plaintiffs presented no evidence that defendant attorneys' determination that the case was not worth pursuing was anything other than an honest belief well founded in the law and in the best interest of their clients. *Basic Food, supra* at 694, 310 NW2d 26.

The instant case is factually analogous to both *Simko* and *Mitchell*. The evidence presented by defendants supports their position that they exercised reasonable skill, care, discretion and judgment. Plaintiffs rely on the testimony of their expert witness who offers the legal conclusion that defendants' actions constituted legal malpractice. However, the attorney judgment rule concerns the element of duty in the malpractice claim. Whether a duty exists is a question of law for the court and merely because the expert witness came to a different conclusion of law does not establish an issue of fact precluding summary disposition.

The gist of plaintiffs' arguments on each of their claims is that defendants failed to use reasonable skill, care, discretion and judgment in their representation of plaintiffs. They correctly assert that defendants had a duty to make reasonable and informed judgments. However, our review of the record indicates that plaintiffs' claims are without merit.

Specifically, with regard to the testimony of Bryan Kutchins, plaintiffs argue that defendants' failure to oppose the testimony of Bryan Kutchins constituted malpractice. Bryan Kutchins is an attorney and also the son of Walter Kutchins, the plaintiff in the underlying suit. Bryan Kutchins was present at the 1973 meeting during which the oral agreement was made between Walter Kutchins, Beznos and Luptak.

Plaintiffs argue that Bryan Kutchins had multiple separate ethical conflicts that should have precluded him from testifying. Specifically, Bryan Kutchins formerly acted as an attorney for plaintiffs and their businesses. Plaintiffs claim that he was using confidential client information.

Defendants deposed Bryan Kutchins in the underlying suit on January 6 and 7, 1993. Bryan Kutchins lived and worked in Florida. In his deposition, Bryan Kutchins corroborated Walter Kutchins' testimony regarding the oral promise that occurred in 1973. Bryan Kutchins testified that his father had been promised a 10 percent equity interest in all projects in which he was involved and that he would receive a payment for a salary shortfall.

Defendants also elicited testimony from Bryan Kutchins that reflected poorly on his credibility as a witness. This testimony included the fact that his firm had a contingency fee agreement with Walter Kutchins in the underlying case. Defendants also elicited the fact that Bryan Kutchins formerly worked as a loan officer with Michigan National Bank and worked directly with Beztak loan transactions. In the course of his job, he obtained personal guarantees and financial statements from Beznos and Luptak, but not from his father (the implication being that if Walter Kutchins were truly a partner as he and his son asserted, then his son would have required the same documentation from him in the loan process). Lastly, defendants questioned Bryan Kutchins about whether he had ever attempted to document the 1973 agreement, to which Bryan Kutchins admitted he had not.

During the underlying suit, Walter Kutchins' attorneys notified the court that pursuant to MRE 804, the unavailability exception to the hearsay rule, they planned to read Bryan Kutchins' deposition into the record rather than call him as a witness. Defendants decided not to object. Defendant Ravitz explained the basis of this decision:

That, in my opinion, it was a former prudent course to deal with a known entity, namely his deposition transcript, which I did not think as harmful as his live testimony may well have been and that since this was the only witness corroborating the plaintiff's claim, if they couldn't even produce him live, and were playing an empty chair, that I thought that that would be very strong and helpful to us, and that while it may be well true that if Bryan did appear in court, we could impeach him, and possibly hurt him a lot. It wasn't worth the risk that he would be more effective live before the jury with Bendure having the opportunity to first massage his testimony, if you will, on direct, and insofar as you go into a trial with certain objectives as to any given witness, that if I knew in advance of trial that I could take the records in without this guy appearing and not get hurt any more than what he had to say when Jim deposed him, I'd take it in a minute before rolling the dice in this case. And I felt strongly that the wisest tactical decision was to not press to have him called live and, indeed, the only reason that gave me pause was Bendure, I felt, obviously didn't want him here and that's why he wasn't coming, and so that makes you, you know, that's alluring to a certain extent but I wasn't going to get into mind games or let the tail wag the dog that way. I was quite pleased that he wasn't appearing. I thought we should accept it and I thought we were stronger than we would be if we did appeal.

Defendants further note that they met with other attorneys in the underlying case before the deposition was read, including Patrick Moran, an expert witness for plaintiffs in this case. Moran confirms that while there was some disagreement about allowing the deposition to be read among the attorneys, they did debate the topic extensively. This testimony establishes that defendants' decision on this matter was purely tactical and that it was well thought out and informed. Thus, they are not liable under the attorney judgment rule.

With regard to plaintiffs' claim that defendants negligently failed to take standard discovery depositions of opposing experts, failed to compel pretrial disclosure of expert opinions, refused to permit clients familiar with the business to consult with experts and failed to object that defendants' non-disclosure of opinions during discovery should preclude the experts from testifying at trial, we find that these claims are also precluded by the attorney judgment rule.

The record reflects that defendants and plaintiffs made decisions regarding the use of damage experts jointly. Defendant Vlasic testified that he typically procured an outside accountant either from Arthur Anderson or Plante Moran to testify as damage experts. Defendant Vlasic presented this approach to plaintiffs who decided that such an analysis would be too expensive and unnecessary. As a result, they did not include any outside damage experts on the 1993 witness list. They did, however, include the in-house accountants from Beztak including John Kure, William Hurst and Todd Lockhart on the witness list. In his deposition, Defendant Vlasic related the substance of his conversation with defendants on the issue of an

independent damages expert to investigate the valuation of Walter Kutchins' claims. Defendant Vlasic stated:

There were ongoing discussions with Mr. Kure to some extent, Mr. Hurst, Mr. Lockhart I guess to some extent, Harold Beznos, maybe to some extent Jerry Luptak on the subject of how damages would be, how we would oppose the plaintiffs damage case, and there were several discussions in which Mr. Harold Beznos and Mr. Kure participated where Mr. Harold Beznos had some thoughts on how he would keep Mr. Kutchins' interest to, in all these projects too, the worth of Mr. Kutchins' alleged interest in all of these projects to almost nothing, and one of the primary, one of the issues we faced was that Beztak over the years had created what they called current value financial statements which they had values for projects and they presented these statements to the banks and to other outsiders to be accurate, so it was really not feasible for us to come to trial and say, "Well, those were all wrong and we were lying to the banks all these years and that the projects were really worth a quarter of that or a half of that or some lower value." That doesn't seem like a responsible tactic, so Mr. Harold Beznos came up on the thought that his family members put into these projects over the years and add interest to it for the value of their equity contributions, that would allow us to diminish the value of the projects from an accounting analysis.

And Mr. Kure, who, I had become persuaded, had very, very good knowledge of all of the Beztak financial operations was very opposed to that because he didn't believe that that would be the case at all, particularly because that could not be fairly accomplished without also showing the money taken out by the family members over the years, and he felt very strongly that, as I think did perhaps Mr. Hurst, if you did that analysis fairly you would end up with projects being worth more, hence the 10% interest being worth more rather than less, and that was a repeated discussion, if you will. We didn't want to be put in the position were we put on an alternative damage number based upon that kind analysis that was higher certainly than Mr. Kutchins' analysis that would have been good, nor did we want to be in a position to put on a number that was albeit lower than what we expected Mr. Kutchins' expert to come up with, still too high, very high, in the 5, 6 maybe million dollar range. We thought that was probably not a good idea either.

Those various discussions evolved, though, after bifurcation. There were various different people involved in those discussions including, as you know, Mr. Newman was involved in looking again at that same analysis and in consultation with Mr. Kure as we approached trial and we got a better handle on what Mr. Scheur would be doing, we decided that the more appropriate tactic to try to disprove damages was simply to attack Mr. Scheuer, not to present an alternative independent or inside for that matter damage analysis.

Thus it appears that after extensive discussion with Kure, the head of finances at Beztak, defendants concluded that conducting an independent damage analysis had the potential to be far more damaging than beneficial. In fact, Kure believed that the type of damage analysis advocated by Beznos would produce a figure higher than the one arrived at by Kutchins' expert.

Furthermore, the record indicates that as trial neared, defendants were specifically instructed by Beznos to retain the accounting firm of Kleiman, Carney & Greenbaum to perform a damage analysis. Although the deadline for including an expert such as this on the witness list had already passed, defendants decided to go ahead with the damage analysis and based on the results, possibly attempt to add the Kleiman accountant to the witness list.

Ultimately, the damage analysis was conducted by Lawrence Newman. Newman testified in his deposition that the results of the analysis were not favorable to plaintiffs. As a result, defendants decided that a better option was to have Kure and Hust, who were most knowledgeable about the finances of Beztak, provide testimony to rebut the testimony of Kutchins' expert.

Plaintiffs fault defendants for their failure to take a second discovery deposition of Kutchins' damage expert, Scheuer. Defendant Vlasic testified on this topic:

We knew, as articulated by Mr. Bendure, the general approach that at least he was telling the court Mr. Scheuer was going to use. We knew what documents Mr. Scheuer was looking at in the immediate pretrial and early trial period in order to develop his opinions, and I was getting feedback from the Beztak accounting staff that I was relying on as to what the meaning of those documents were in terms of his presentation and also based upon their discussions with Mr. Scheuer and his people in terms of their determining what, in fact, he was going to produce. And then before he actually gave his opinions and took the stand, I had the actual spreadsheets that he was going to use to present his opinions.

Defendants assert that there was no way they could present an alternative damages model that would have been beneficial to their case. Kutchins relied upon Beztak's internal current value financial statements in arriving at his figure. This meant that an alternate proposal ignoring those documents would indicate to the jury that Beztak had lied to the IRS and to financial institutions. Clearly this would not be in the best interests of their clients.

Defendants assert that they did not need to depose Schueur a second time because they had his spreadsheets and were kept well abreast of the materials that he was gathering to form his opinion. In fact, at trial defendants attacked Schueur by questioning his methodology and results.

With regard to Kutchins' expert Gadiant, who testified on the subject of the salary shortfall claim, defendants again determined that an alternative presentation of the figure would be less successful than an attack on Gadiant. Initially, defendants tried to exclude his testimony with a motion to disallow his testimony. Although he was allowed to testify, Gadiant was forced to disclose information that he had withheld from his deposition. In fact, during his testimony, defendants impeached Gadiant with his past felony conviction. Additionally, Beznos himself provided the jury with alternate figures during his testimony by detailing the standard pay rate of general contractors in the industry.

Again, defendants' decisions with regard to the damage experts were informed tactical decisions. They determined, based on consultations with Beztak's own financial person, that there was a likelihood any outside damage figure would end up higher than Kutchins' figure.

When they hired an outside accountant, they found this to be the case. Furthermore, defendants have demonstrated that they were well aware of what the testimony of Scheuer and Gadiant would be at trial based on the information the two were reviewing in preparation for the trial and on Scheuer's spreadsheets.

Plaintiffs contended that genuine issues of material fact exist with regard to whether the judgments made by defendants were indeed "reasonable and informed." However, our review of the record and analysis of plaintiffs' remaining claims reveal that defendants did make informed decisions regarding trial tactics on each of the asserted claims. The underlying case was lengthy and complex and involved multiple attorneys and plaintiffs, and the record indicates that defendants were well informed throughout the trial and made countless decisions regarding which courses of action to pursue. Merely because plaintiffs now believe that some of these courses of action were less desirable than their suggested courses in hindsight, does not indicate that defendants breached their duty to plaintiffs. As a result, the trial court correctly granted defendants' motion for summary disposition on the basis of the attorney judgment rule. Resolution of plaintiffs' remaining issues is not necessary based on our conclusion that the trial court properly granted summary disposition on the basis of the attorney judgment rule.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette